Supreme Court, U.S.
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No. 98-746

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

NATIONWIDE MUTUAL INSURANCE COMPANY,

Petitioner,

vs.

INSURANCE COMPANY OF NORTH AMERICA, CIGNA CORPORATION and CIGNA INTERNATIONAL CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, under New York law, a clear and unambiguous disclaimer clause in an agreement, stating that the agreement confers no rights or remedies on any third party, bars a non-party to the agreement from enforcing it.

STATEMENT UNDER RULE 29.6

The parties to this proceeding are set forth in the caption. Respondents make the following disclosure pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States:

CIGNA Corporation
CIGNA Holdings, Inc.
CIGNA Information Services, Inc.
CIGNA Investment Group, Inc.
CIGNA International Finance Inc.
CIGNA International Investment Advisors, Ltd.
CIGNA Fund Managers Limited
CIGNA Mezzanine Holdings, Inc.
CIGNA International Investment Advisors Australia Limited
CIGNA International Investment Advisors K.K.
Malrosian, Inc.
CIGNA Investment Advisory Company, Inc.
CIGNA Investments, Inc.
CIGNA Advisory Partners, Inc.
CIGNA Funds Group
CIGNA Financial Futures, Inc.
CIGNA High Income Shares
CIGNA Institutional Funds Group
CIGNA Leveraged Capital Fund, Inc.
CIGNA Funding Limited Partnership
CIGNA Mezzanine Partners III, Inc.
CIGNA Variable Products Group
INA Investment Securities, Inc.
CIGNA Mezzanine Capital, Inc.
CIGNA Mezzanine Holdings II, Inc.
Silver Brook Real Estate Development Company
CIGNA Properties, Inc.
CIGNA Conference Facilities, Inc.

Connecticut General Corporation
Benefits Access Inc.
CG Individual Tax Benefits Payments, Inc.
CG Life Pension Benefit Payments, Inc.
CG LINA Pension Benefits Payments, Inc.
CG Trust Company
CIGNA Benefits Processing Ireland Ltd.
CIGNA Dental Health, Inc.
CIGNA Dental Health of California, Inc.
CIGNA Dental Health of Colorado, Inc.
CIGNA Dental Health of Delaware, Inc.
CIGNA Dental Health of Florida, Inc.
CIGNA Dental Health of Illinois, Inc.
CIGNA Dental Health of Kansas, Inc.
CIGNA Dental Health of Kentucky, Inc.
CIGNA Dental Health of Maryland, Inc.
CIGNA Dental Health of New Jersey, Inc.
CIGNA Dental Health of New Mexico, Inc.
CIGNA Dental Health of North Carolina, Inc.
CIGNA Dental Health of Ohio, Inc.
CIGNA Dental Health of Pennsylvania, Inc.
CIGNA Dental Health of Texas, Inc.
CIGNA Dental Health Plan of Arizona, Inc.
CIGNA Employee Benefits Services, Inc.
CIGNA Financial Partners, Inc.
CIGNA Realty Resources, Inc. – Fifth
The Tulsa Corporation
CIGNA Realty Resources, Inc. – Twelfth
CIGNA Realty Resources, Inc. – Fifteenth
Connecticut General Realty Resources, Inc. – Fourth
CIGNA Financial Services, Inc.
CIGNA Health Corporation
Healthsource, Inc.
Contemporary Management Associates, Inc.
Healthsource Connecticut, Inc.
Healthsource Corporate Services, Inc.

Healthsource Innovative Medical Management, Inc.
Healthsource Employee Services, Inc.
Healthsource Health Plans, Inc.
CIGNA Healthcare of North Carolina, Inc.
Healthsource North Carolina, Inc.
Healthsource North Carolina Administrators, Inc.
Healthsource Indiana, Inc.
Healthsource Indiana Insurance Company
Healthsource Indiana Managed Care Plan, Inc.
Healthsource Insurance Group, Inc.
Healthsource Kentucky Ventures, Inc.
Healthsource Kentucky, Inc.
Healthsource Maine, Inc.
Healthsource Maine Preferred, Inc.
Healthsource Management, Inc.
Healthsource Syracuse, Inc.
Healthsource New York, Inc.
Healthsource HMO of New York, Inc.
Healthsource Preferred of New York, Inc.
CIGNA Healthcare of Tennessee, Inc.
Healthsource Preferred, Inc.
Healthsource Massachusetts, Inc.
Healthsource Metropolitan New York Holding Company, Inc.
Healthsource New York/New Jersey, Inc.
Healthsource New Hampshire, Inc.
Healthsource Ohio, Inc.
Healthsource Ohio Preferred, Inc.
Healthsource Preferred, Inc.
Healthsource Properties, Inc.
Healthsource Rhode Island, Inc.
Healthsource RX, Inc.
Healthsource South, Inc.
Healthsource Arkansas Ventures, Inc.
Healthsource Arkansas, Inc.
Healthsource Arkansas Preferred, Inc.

Spradley & Coker, Inc.
Healthsource Insurance Company
Healthsource Physicians Group of South Carolina, Inc.
Healthsource Provident Administrators, Inc.
CIGNA Healthcare of Texas, Inc.
HS North Texas Ventures, Inc.
Provident Health Care Plans, Inc.
CIGNA Healthcare of Georgia, Inc.
Employee Benefit Plan Administration, Inc.
Physicians' Health Systems, Inc.
Healthsource Insurance Services, Inc.
Healthsource South Carolina, Inc.
Arizona Health Plan, Inc.
CIGNA Healthcare Mid-Atlantic, Inc.
CIGNA Healthcare of Arizona, Inc.
CIGNA Community Choice, Inc.
CIGNA Healthcare of California, Inc.
CIGNA Healthcare of Colorado, Inc.
CIGNA Healthcare of Connecticut, Inc.
CIGNA Healthcare of Delaware, Inc.
CIGNA Healthcare of Florida, Inc.
CIGNA Healthcare of Illinois, Inc.
CIGNA Healthcare of Louisiana, Inc.
CIGNA Healthcare of Massachusetts, Inc.
CIGNA Healthcare of New Jersey, Inc.
CIGNA Healthcare of New York, Inc.
CIGNA Healthcare of Northern New Jersey, Inc.
CIGNA Healthcare of Ohio, Inc.
CIGNA Healthcare of Oklahoma, Inc.
CIGNA Healthcare of Pennsylvania, Inc.
CIGNA Healthcare of St. Louis, Inc.
CIGNA Healthcare of Utah, Inc.
CIGNA Healthcare of Virginia, Inc.
Lovelace Health Systems, Inc.
Ross Loos Hospital, Inc.
Temple Insurance Company Limited

CIGNA Healthcare Benefits, Inc.
CIGNA Integratedcare, Inc.
CIGNA Managed Care Benefits Company
CIGNA Re Corporation
Blodget & Hazard Limited
Connecticut General Benefit Payments, Inc.
Connecticut General Life Insurance Company
1717 Main Street Corporation
6000 Fairview Associates, LLC
6010 Fairview Associates, LLC
All-Net Preferred Providers, Inc.
Brook Arbor Company LLC
CG 6, LLC
Cal Portfolio VI, LLC
CG Michigan Properties, LLC
Center City Realty, LLC
Transwestern/CG II, LLC
Center Harbor LLC
CIGNA CBO 1996-1 Ltd.
CIGNA CBO 1996-1 (Delaware) Corp.
CIGNA Dullestown LLC
CIGNA Life Insurance Company
CIGNA Mortgage Securities, Inc.
Connecticut Sugar Creek LLC
Cottage Grove Cable II, LLC
Cottage Grove Vessels, Inc.
Draper's CG, LLC
Engineered Data Products, Inc.
GPM Gas Gathering L.L.C.
Houston Properties, L.L.C.
Transwestern/Connecticut Partners GP I LLC
MNH Mall, LLC
PCGP, Inc.
Quebec Street Investments, Inc.
Ridgedale REIT, Inc.
Riverside South Forty L.L.C.

Rosado Grande, Inc.
SAR at Shawnee Ridge, L.L.C.
SAR Legacy, L.L.C.
Shorebreeze Associates, L.L.C.
Southland REIT, Inc.
Disability Claim Services, Inc.
Global Portfolio Strategies, Inc.
INA Life Insurance Company of New York
INA Tax Benefits Reporting, Inc.
International Rehabilitation Associates, Inc.
Intracorp Peer Review Organization, Inc.
Intracorp, Inc.
Life Insurance Company of North America
AIC Holdings, Inc.
CIGNA Direct Marketing Company, Inc.
CIGNA Life Insurance Company of Canada
Cottage Grove Cable IV, LLC
INA Himawari Life Insurance Co., Ltd.
LINA Benefit Payments, Inc.
MCC Behavioral Care, Inc.
MCC Independent Practice Association of Greater New York, Inc.
MCC Behavioral Care of California, Inc.
Tel-Drug, Inc.
Trilog, Inc.
INA Corporation
CIGNA International Holdings, Ltd.
AFIA Finance Corporation
AFIA Socieda Anonima
AFIA Venezolana, C.A.
CIGNA Brasil Participacoes Ltda.
CIGNA Servicos Ltda.
Excel CIGNA Seguradora S.A.
CIGNA Italy – Societa a Responsabilita Limitata
CIGNA Thai Company Limited
Corafin S.A.C.I.F.A.

ESIS International Asesorias Limitada
Fire, Equity and General Insurance Company Limited
Indi Servicios C. Ltda.
Inversiones Continental, S.A. de C.V.
P.T. Asuransi CIGNA Indonesia
Riyad Insurance Company Ltd.
Safire Private Limited
AFIA (CIGNA) Corporation, Limited
AFIA (INA) Corporation, Limited
AFIA
Amazonas Compania Anonima de Seguros
Arabia CIGNA Insurance Company Limited E.C.
CIGNA Argentina Compania de Seguros S.A.
CIGNA Brasil Empreendimentos Ltda.
Amico Assistencia Medica A Industria E Comercio Ltda.
INA Seguradora S.A.
CIGNA Compania de Seguros (Chile) S.A.
CIGNA G.B. Holdings, Ltd.
CIGNA Reinsurance Company (UK) Limited
CIGNA Services U.K. Limited
Ernest Linsdell Limited
CIGNA UK Retirement Savings Plan
Crusader Insurance Company (Ghana) Limited
Crusader Company (Ghana) Limited
Insurance Company of North America (U.K.) Limited
CIGNA Healthcare Management Company (India)
Private Limited
CIGNA Insurance Asia Pacific Limited
CIGNA Insurance Singapore Limited
CIGNA Superannuation Pty. Limited
CIGNA Insurance Company Limited
CIGNA Insurance Company of Puerto Rico
CIGNA Insurance New Zealand Limited
CIGNA Life Insurance New Zealand Limited
CIGNA International Corporation
CIGNA Eastern European Corporate Services SP. Z O.O.

CIGNA International Insurance Company of Hong Kong Limited
CIGNA International Insurance Managers, Ltd.
CIGNA Overseas Insurance Company Ltd.
Banco Excel Economico S.A.
CIGNA Accident and Fire Insurance Company, Ltd.
CIGNA China Investment Fund LDC
CIGNA Marketing Group, C.A.
CIGNA Overseas Holdings, Inc.
CIGNA Insurance Company of Europe S.A.-N.V.
CIGNA Life Insurance Company of Europe S.A.-N.V.
CIGNA STU S.A.
CIGNA STU Zycie S.A.
Grancol, Asesoramiento Y Servicios Ltda.
CIGNA Seguros de Colombia S.A.
CIGNA Worldwide Insurance Company
P.T. Asuransi Niaga Cigna Life
PCIB CIGNA Life Insurance Corporation
Century Inversiones, S.A.
CIGNA de Venezuela Intermediarios de Reaseguros S.A.
Compania Anonima de Seguros "Avila"
Cover Direct, Inc.
Victoria Hall Company Limited
Delpanama S.A.
Empresa Guatemalteca CIGNA de Seguros, Sociedad Anonima
Contabilidad Mecanizada, Sociedad Anonima
ESIS International, Inc.
ESIS International (Puerto Rico), Inc.
Inacan Holdings Ltd.
CIGNA Insurance Company of Canada
Inacap Sociedad Anonima
Inacap – Reaseguros, Sociedad Anonima
Inamex, S.A.
Inaven, C.A.
Inversiones INA Limitada

CIGNA Compania de Seguros de Vida (Chile) S.A.
CIGNA Salud Isapre S.A.
Unimed S.A. Isapre Medica
La Positiva, Compania Nacional de Seguros Sociedad Anonima
Maritime General Insurance Company Limited
Perdana CIGNA Insurance Berhad
Philippine Healthcare Providers, Inc.
Reaseguradoro Nuevo Mundo S.A.
Seguros Azteca, S.A.
Seguros CIGNA, S.A.
Seguros Comercial America, S.A. de C.V.
INA Financial Corporation
CIGNA Financial Institution Solutions, Inc.
Brandywine Holdings Corporation
CIGNA Run-Off Services, Inc.
Cravens, Dargan & Company, Pacific Coast
Cravens, Dargan & Company, Pacific Coast of Illinois, Inc.
Assurex Development Corporation
CIGNA International Reinsurance Company Ltd.
CIGNA International Brokers, Ltd.
Century Indemnity Company
Century Reinsurance Company
CIGNA Reinsurance Company
CIGNA Reinsurance Company S.A.-N.V.
The 1792 Company
Cottage Grove Cable I, L.L.C.
Western Agency Management, Inc.
Robert F. Coleman, Inc.
International Surplus Adjusting Services
National Employee Benefits Corporation
INA Holdings Corporation
American Adjustment Company, Inc.
American Lenders Facilities, Inc.
Bankers Standard Insurance Company

Bankers Standard Fire and Marine Company
CIGNA Property and Casualty Insurance Company
ALIC, Incorporated
CIGNA Lloyds Insurance Company
CIGNA Fire Underwriters Insurance Company
CIGNA Insurance Company
Pacific Employers Insurance Company
CIGNA Insurance Company of Texas
Illinois Union Insurance Company
CIGNA Insurance Company of the Midwest
CIGNA Real Estate, Inc.
CONGEN Properties, Inc.
2525 East Arizona Biltmore Circle Corp.
Cottage Grove Cable III, LLC
ESIS, Inc.
CIGNA Excess and Surplus Insurance Services, Inc. (GA)
CIGNA Excess and Surplus Insurance Services, Inc. (CA)
CIGNA Excess and Surplus Insurance Services, Inc. (IL)
CIGNA Excess and Surplus Insurance Services, Inc. (PA)
Excess and Surplus Insurance Services, Inc.
INA Special Risk Facilities, Inc.
INAC Corp.
INAC Corp. of California
INAMAR Insurance Underwriting Agency, Inc.
INMAR Insurance Underwriting Agency, Inc. of Massachusetts
INAMAR Insurance Underwriting Agency, Inc. of Ohio
INAMAR Insurance Underwriting Agency, Inc. of Texas
INAPRO, Inc.
Reinsurance Solutions International, LLC

Global Surety Network, Inc.
Insurance Company of North America
Atlantic Employers Insurance Company
Cover-All Technologies, Inc.
CIGNA Employers Insurance Company
CIGNA Insurance Company of Ohio
Indemnity Insurance Company of North America
Allied Insurance Company
CIGNA Indemnity Insurance Company
CIGNA Insurance Company of Illinois
INA Surplus Insurance Company
Rain and Hail Insurance Service Incorporated
Marketdyne International, Inc.
CIGNA Railroad Insurance Brokers, Inc.
Recovery Services International, Inc.

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Respondents Insurance Company of North America, ("INA"), CIGNA Corporation ("CIGNA Corp."), and CIGNA International Corporation (collectively, the "CIGNA Respondents") respectfully submit this brief in opposition to the petition (the "Petition") of Nationwide Mutual Insurance Company ("Nationwide") for a writ of certiorari to review a decision of the United States Court of Appeals for the Sixth Circuit. That decision is reported at 150 F.3d 545 (6th Cir. 1998) and is reprinted in the appendix to the Petition.[1]

STATEMENT OF THE CASE

This diversity case concerns the Sixth Circuit's straightforward application of well-established principles of New York contract law to an agreement expressly governed by New York law. The Sixth Circuit reversed the District Court's judgment, holding that the "express disclaimer" in the Insurance and Reinsurance Assumption Agreement (the "Assumption Agreement") between one of the CIGNA Respondents and The Home Insurance Company ("Home") prevented Nationwide from suing the CIGNA Respondents to enforce reinsurance obligations assumed from Home under that agreement. (App. 9) Construing New York contract law, the Sixth Circuit held that "[d]espite Nationwide's valiant efforts to concoct alternative meanings of the third-party disclaimer language that would not preclude it from suing the [CIGNA Respondents] . . . the third-party disclaimer language is clear and unequivocal." (App. 9) The Sixth Circuit concluded that "Nationwide cannot bring suit directly against the [CIGNA Respondents] on the Assumption Agreement or any obligations assumed

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[1] References to the appendix of the Petition are designated with the prefix "App."

therein. . . ." (App. 12) This uncontroversial conclusion – resting as it does on well-established principles of New York law that the Sixth Circuit was bound to follow – cannot under any stretch of the imagination provide a basis for a grant of certiorari.

A. Nationwide's Participation In The Rutty Reinsurance Pool

During the mid-1960's, Nationwide participated in a reinsurance pool managed by M.E. Rutty Underwriting Agency Limited ("Rutty"). (A116)[2] In connection with that pool, Nationwide, pursuant to certain underwriting agreements (the "Underwriting Agreements"), delegated to Rutty the authority to produce, underwrite and administer a book of direct and reinsurance business. (A116) As a member of the pool, Nationwide received a proportionate share of the premiums and was liable for a proportionate share of the losses on the business underwritten by Rutty pursuant to, and in accordance with, the terms of the Underwriting Agreements. (A116)[3]

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[2] Citations with the prefix "A" refer to the joint appendix filed with the Sixth Circuit.

[3] The Rutty reinsurance pool operated as follows: Rutty, on behalf of the pool, issued policies or contracts or reinsurance to insureds or reinsureds in the name of (or "on the paper" of) one of the pool members. (A146) That pool member was referred to as the issuing carrier and was directly liable to the insured/reinsured. Pursuant to the pool arrangements, however, the premiums and losses arising from the underlying policy or contract were shared proportionately by all of the pool members. (A117)

B. Home's Reinsurance Of Nationwide

In 1977, Nationwide entered into a reinsurance agreement, entitled "Reinsurance Contract No. R" (the "Reinsurance Agreement" (A228-40), with Home. Pursuant to the Reinsurance Agreement, Home agreed to reinsure Nationwide with respect to "all losses which [Nationwide] may be or may become liable to pay arising out of risks written for" Nationwide by Rutty pursuant to, and in accordance with, the terms of the Underwriting Agreements. (A228)[4]

C. Home's Participation In AFIA And CIGNA's Purchase Of AFIA

Home was a member of an association of U.S.-domiciled property and casualty insurance companies – the American Foreign Insurance Association ("AFIA") – which collectively engaged in foreign insurance, surety and reinsurance business.[5]

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[4] The Reinsurance Agreement contains a broad arbitration clause. (A232-33) By Opinion and Order filed with the Clerk on October 21, 1996 (A281-94), the District Court granted Home's motion to compel arbitration of Nationwide's claims against Home.

[5] AFIA was authorized by members to produce, underwrite and administer a block of insurance and reinsurance business. AFIA issued policies or contracts of reinsurance to insureds or reinsureds in the name of (or "on the paper" of) one of the members (depending on which member was authorized in a given jurisdiction). That member was referred to as the issuing carrier and was directly liable to the insured/reinsured. However, the premiums and losses

(continued)

On December 30, 1983, the CIGNA Respondents entered into "Purchase Agreement No. 1" (the "Purchase Agreement") (A572-676) with Home and other members of AFIA pursuant to which the CIGNA Respondents purchased certain rights and interests relating to the business of AFIA. Under Section 1 of the Purchase Agreement, entitled "Purchase and Sale of the AFIA Interests," CIGNA Corp. agreed "on the Closing Date to cause one or more of the Purchasers and INA to assume the AFIA Obligations, becoming primarily liable in respect thereof." (A579) CIGNA Corp.'s agreement "to cause" INA to assume the AFIA Obligations is further described in Section 1.4 of the Purchase Agreement, entitled "The Closing," which provides, in pertinent part:

> The closing . . . shall be held . . . on January 31, 1984 and [a]t the Closing, . . . (a) CIGNA [Corp.] . . . (ii) will cause to be delivered to the Sellers [including Home] an instrument or instruments . . ., which shall contain provisions substantially as set forth in Exhibit C hereto . . . evidencing . . . INA's assumption of the respective AFIA Obligations.

(A581)

(continued from previous page . . .)

arising from the underlying policy or contract were shared proportionately by all of the members. In entering into the Reinsurance Agreement, Home acted as the issuing carrier for the AFIA pool members. (A147)

Pursuant to Sections 1 and 1.4 of the Purchase Agreement, CIGNA Corp. "caused" INA to enter into the Assumption Agreement (A677-89) with Home and other members of AFIA. (The Purchase Agreement and the Assumption Agreement are sometimes hereinafter collectively referred to as the "AFIA Agreements.") The Assumption Agreement contains provisions substantially as set forth in Exhibit C to the Purchase Agreement, is dated January 31, 1984 (the date of the Closing) and was delivered to the Sellers (including Home) at the closing on January 31, 1984. (A677-89)

The Reinsurance Agreement was among the AFIA Obligations covered by the Assumption Agreement. Thus, pursuant to the Assumption Agreement, INA, prior to Home's insolvency, "assume[d] as its direct obligations and agrees to pay on behalf of [Home] when payment thereof is due all insurance and reinsurance liabilities . . . included in AFIA Obligations." (A679) (emphasis added)

The parties to the Assumption Agreement, however, expressly and unambiguously made INA's obligations enforceable only by Home (or by Home's statutory successor) and not by Nationwide. Indeed, Section 12 of the Assumption Agreement (the disclaimer clause) provides, in pertinent part:

> Nothing in this Assumption Agreement express or implied, is intended, or shall be construed, to confer upon or give to any person, firm or corporation (other than the parties hereto and their permitted successors and assigns) any rights or remedies under or by reason of this Assumption Agreement, or any term, provision, condition, undertaking,

> warranty, representation, indemnity, covenant or agreement contained herein.

(A687-88) (emphasis added)

Section 13.4 of the Purchase Agreement (the disclaimer clause) likewise unequivocally provides:

> Nothing in this Agreement, express or implied, is intended, or shall be construed, to confer upon or give to any person, firm or corporation (other than the parties hereto and their permitted successors and assigns) any rights or remedies under or by reason of this Agreement, or any term, provision, condition, undertaking, warranty, representation, indemnity, covenant or agreement contained herein.

(A634) (emphasis added) Both the Assumption Agreement (A687) and the Purchase Agreement (A636) expressly provide that they "shall be governed by and construed and enforced in accordance with the laws of the State of New York."

D. The CIGNA Respondents' Summary Judgment Motion And Judge Sargus' March 25, 1997 Opinion and Order

On or about September 21, 1995, Nationwide served its First Amended Complaint which alleged that Nationwide is a "direct and intended third-party beneficiar[y]" of the Purchase Agreement and the Assumption Agreement and asserted various claims directly against the CIGNA Respondents. (A122-24)

In November 1995, the CIGNA Respondents moved for summary judgment dismissing Nationwide's First Amended Complaint on the ground that the disclaimer clauses in the Purchase Agreement and the Assumption Agreement clearly and unambiguously provide that Nationwide has no right or remedy under either of those agreements.

On or about March 25, 1997, the District Court issued its Opinion agreeing with the CIGNA Respondents that Nationwide is not a third-party beneficiary but nevertheless denying the CIGNA Respondents' motion for summary judgment. (App. 20-21) In addition, although Nationwide never made (a) a cross-motion for summary judgment or (b) an application to compel arbitration, the District Court effectively granted summary judgment in favor of Nationwide, finding that Nationwide, as a non-party, nevertheless had a right and a remedy directly against the CIGNA Respondents for an alleged breach of contract and compelled arbitration, finding that "[the CIGNA Respondents], standing in the shoes of Home, [are] bound by the same arbitration provision which Home, [the CIGNA Respondents'] predecessor in interest, successfully enforced against Nationwide." (App. 22, 27)

The District Court correctly ruled in a concise and cogent analysis, that:

a. "[Paragraph] 12 of the Purchase Agreement [i.e., the disclaimer provision] clearly and unambiguously prevents anyone from claiming status as a third-party beneficiary to that Agreement" (App. 21); and

b. "Nationwide fails to state a claim under New York law that [the CIGNA Respondents] waived their right to enforce the disclaimer provision." (App. 21)

The District Court, however, also stated that "rejection of Nationwide's status as a third-party beneficiary is not necessarily dispositive of Nationwide's claim for breach of contract" (App. 21), and held that "Nationwide may . . . pursue a claim [against the CIGNA Respondents] for breach of contract as an obligee-beneficiary of the Purchase Agreement." (App. 22) Finding that the CIGNA Respondents "stood in the shoes of Home," it dismissed the action and referred Nationwide's claims against the CIGNA Respondents to arbitration under the arbitration clause in Home's Reinsurance Agreement with Nationwide. (App. 27)

E. The Sixth Circuit's Decision

The CIGNA Respondents appealed to the Sixth Circuit, and Nationwide cross-appealed the District Court's finding that Nationwide was not a third-party beneficiary of the AFIA Agreements. (App. 3) The Sixth Circuit reversed the District Court's judgment referring Nationwide's claims to arbitration and remanded the case for the District Court to enter an order dismissing Nationwide's claims against the CIGNA Respondents. (App. 13-14)

In a well-reasoned opinion firmly grounded in New York law, the Sixth Circuit ruled that:

> Despite Nationwide's valiant efforts to concoct alternative meanings of the third-party disclaimer language that would not preclude it from suing the [CIGNA Respondents] on the reinsurance contract they

> assumed from Home, we hold that the third-party disclaimer language is clear and unequivocal. It bars any person or entity, except the parties to the Assumption Agreement (the members of AFIA and the [CIGNA Respondents]), from suing on any of the obligations undertaken pursuant to the Assumption Agreement, including the [CIGNA Respondents'] obligation to make payments on the reinsurance contract between Nationwide and Home. Under New York law, contract language is ambiguous when it is reasonably susceptible to more than one reading. We do not find reasonable any construction of the disclaimer at issue that seeks to qualify or limit its broad, simple, and absolute language preventing any third party from enforcing the Assumption Agreement.

(App. 9) (emphasis added; citation and quotation omitted)

The Sixth Circuit also pointed out that the District Court's decision was "premised on a legally erroneous distinction between obligee-beneficiaries and third-party beneficiaries." (App. 10) (emphasis added) Correctly noting that an "obligee beneficiary" is "simply one type of third-party beneficiaries," the court observed that "whether or not Nationwide is an obligee-beneficiary is of no legal significance":

> [Nationwide] is still not a party to the agreement between the members of AFIA and the [CIGNA Respondents] and thus is precluded from bringing a claim directly against the [CIGNA Respondents] to enforce

> the reinsurance obligations the [CIGNA Respondents] assumed from Home.

(App. 10-11)

The Sixth Circuit also rejected Nationwide's argument that the disclaimer does not apply to it "because the [CIGNA Respondents] directly assumed Home's reinsurance obligation to Nationwide in the sense that they agreed to make payments directly to Nationwide and other insureds." (App. 11-12) The court correctly ruled that "whether or not there was a direct assumption does not alter the decisive fact that Nationwide is a stranger to the Assumption Agreement through which it seeks to impose liability upon the [CIGNA Respondents]." (App. 12)

Finally, the Sixth Circuit ruled against Nationwide on its cross-appeal, finding that the District Court correctly held that Nationwide was not a third-party beneficiary:

> [T]he disclaimer provision precludes [Nationwide] and all other third parties to the . . . [Assumption Agreement] from enforcing it. By precluding any third party from enforcing the agreement, this same disclaimer defeats Nationwide's claim that it belongs to a discrete subset of generic third parties referred to as third-party beneficiaries, whose distinguishing characteristic is their legal right to enforce contracts to which they are not a party.

(A12-13) (citations omitted)

REASONS FOR DENYING THE WRIT

Standard For Granting Writ Of Certiorari

The rules of this Court state that "[a] petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10 (1997). This Court does not review questions of state law except where there has been "blatant federal court nullification of state law." Leavitt v. Jane L., 518 U.S. 137, 145 (1996); see also Huddleston v. Dwyer, 322 U.S. 232, 237 (1944) ("[O]rdinarily we accept, and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts."). "[A] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

POINT I

THE SIXTH CIRCUIT'S DECISION IS LIMITED TO STATE LAW ISSUES, WHICH THIS COURT REVIEWS ONLY IN CERTAIN "EXTRAORDINARY" CIRCUMSTANCES THAT ARE ABSENT HERE

Nationwide concedes that there are no constitutional or statutory provisions at issue here. (Petition at 4.) Moreover, Nationwide does not claim that the Sixth Circuit's decision: (1) conflicts with a decision of another U.S. court of appeals on the "same important matter," Sup. Ct. R. 10(a); (2) decided an "important federal question" in a way that conflicts the decision of a state court of last resort, id.; or (3) involves "an important question of federal law" that should be settled by this Court. See Sup. Ct. R. 10(c).

The Petition merely raises an issue of state law, i.e., whether, under New York contract law, the disclaimer clause in the Assumption Agreement barred Nationwide's claims against the CIGNA Respondents. The Supreme Court, however, will review decisions on state law issues only in "extraordinary" or "exceptional" cases where there has been "blatant federal-court nullification of state law." Leavitt, 518 U.S. at 145; Huddleston, 322 U.S. at 237.

A. The Sixth Circuit's Decision Did Not Nullify New York State Law

Here, the Sixth Circuit did not nullify New York law, blatantly or otherwise, and Nationwide does not (and cannot) argue that it did. Indeed, Nationwide concedes, as it must, that "New York law . . . will enforce third-party disclaimer provisions" in contracts. (Petition at 18.) The Petition simply asserts that the Sixth Circuit should not have applied this well-established New York law on disclaimer clauses to the Assumption Agreement at issue in this case. (See id.)

Specifically, Nationwide's asserts that (a) the Sixth Circuit recognized that the Assumption Agreement was "assumption reinsurance" and (b) "assumption reinsurance creates privity between the reinsurer and the insured as a matter of law." (Petition at 11.) According to Nationwide, by enforcing a third party disclaimer clause in a purported "assumption reinsurance" agreement, the Sixth Circuit's decision established "a rule of contract interpretation" "that ignores," "rewrites," and "contravenes basic rules of insurance and contract law . . . " (Petition at 13, 18.)

This argument misses the point entirely. Even assuming (contrary to fact and law) that the Assumption

Agreement is an "assumption reinsurance" agreement,[6] Nationwide's burden on its Petition was to demonstrate that (a) New York law does not permit enforcement of third-party beneficiary disclaimer provisions contained in "assumption reinsurance" agreements (even though such clauses are concededly enforceable in all other agreements); and (b) the Sixth Circuit blatantly nullified this principle of New York law by enforcing the third-party disclaimer in the Assumption Agreement.

Nationwide has not met – and could not possibly meet – this burden because New York law permits parties to include third-party disclaimer clauses in all agreements, including assumption agreements. New York's highest court has held that, regardless of the label used, the non-party's right to recover directly from the assuming party under an "assumption agreement" must be determined by applying third-party beneficiary law principles:

> Accepting, as on this appeal we must, the truth of the allegations that the express provisions of assumption were actually made by Spitzer and Thompson, as agents, acting for and on behalf of the defendant, there can be no doubt that the plaintiffs have a direct right of action against the latter to enforce the contract duty explicitly assumed by it through agents. The assumption agreement between

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[6] Contrary to Nationwide's assertions, the Sixth Circuit did not find that that the Assumption Agreement constituted "assumption reinsurance." Indeed, the term "assumption reinsurance" appears nowhere in the Sixth Circuit's opinion. (See App. 1-14.) Thus, Nationwide's argument rests on a false premise.

> Embossing and the defendant . . . constitutes a creditor beneficiary contract in which Embossing is promisee, the defendant is promisor and the plaintiffs are third-party beneficiaries.

Nicholson v. 300 Broadway Realty Corp., 164 N.E.2d 832, 836 (N.Y. 1959) (emphasis added) (internal quotation omitted); Langel v. Betz, 250 N.E. 159, 163 (N.Y. 1928); Rosenheck v. Calcam Associates, Inc., 649 N.Y.S.2d 247, 249 (3d Dep't 1996); United States Cas. Co. v. Jungreis, 250 N.Y.S.2d 749, 750 (1st Dep't 1964).

Ironically, Nationwide's own authority, Glen v. Hope Mut. Life Ins. Co., 56 N.Y. 379 (1874), hammers this point home, making clear that a non-party's right to enforce an "assumption reinsurance" agreement is likewise governed by third-party beneficiary principles. In finding that an insured could recover from the reinsurer under an assumption reinsurance contract, the court relied on Lawrence v. Fox, 20 N.Y. 168 (1859), one of the seminal New York cases on the third-party beneficiary doctrine. See Fourth Ocean Putnam Corp v. Interstate Wrecking Co., 485 N.E.2d 208, 211 (N.Y. 1985); Seaver v. Ransom, 120 N.E. 639, 640 (N.Y. 1918).[7]

Of course, one fundamental tenet of New York's third-party beneficiary doctrine is that the parties may negate by agreement any intention to confer benefits on a non-party. See Morse/Diesel, Inc. v. Trinity Indus., Inc., 859 F.2d 242, 249 (2d Cir. 1988); Fourth Ocean, 465 N.E.2d at 212 n.2; Binghamton Masonic Temple Inc. v. City of Binghamton, 623 N.Y.S.2d 357, 360 (3d Dep't 1995), leave to appeal

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[7] Hope Mutual is thus completely in accord with Nicholson, 164 N.E.2d at 836, which also relied on Lawrence.

denied, 655 N.E.2d 400 (N.Y. 1995); NEPCO Forged Products, Inc. v. Consolidated Edison Co., 470 N.Y.S.2d 680, 681 (2d Dep't 1985); Edward B. Fitzpatrick, Jr. Constr. Corp. v. Suffolk County, 525 N.Y.S.2d 863, 866 (2d Dep't 1988), appeal denied, 534 N.E.2d 315 (N.Y. 1988), rearg. denied, 536 N.E.2d 631 (N.Y. 1989); City of Olean v. New York State Envtl. Facilities Corp., 625 N.Y.S.2d 775, 776 (4th Dep't 1995), rearg. denied, No. 152/95, 153/95, 1995 WL 350154 (4th Dep't Jun. 9, 1995); Rosier v. Brown, 601 N.Y.S.2d 554, 557 (Rochester City Ct. 1993).

Thus, under New York law, an assumption agreement does not magically transform the assuming party into a party to the underlying agreement between the non-party and the party whose obligations are assumed. Rather, the non-party is simply a putative third-party beneficiary whose rights (if any) can be – as the District Court, the Sixth Circuit (App. 9, 21) and New York's highest court have recognized, Fourth Ocean, 485 N.E.2d at 212 n.2. – "'negated by express agreement of the promisor and the promisee.'" In other words, it is the parties' intention to confer (or not confer) third-party beneficiary status that controls, not the legal label of "assumption" or "reinsurance assumption."

Accordingly, New York law fully recognizes that disclaimer provisions in assumption agreements (including "reinsurance assumption" agreements) are valid and enforceable. Therefore, far from blatantly nullifying New York law, the Sixth Circuit correctly applied it and enforced the third-party disclaimer clause in the Assumption Agreement. Indeed, if this Court were to grant certiorari and reverse the Sixth Circuit, this Court would be guilty of blatantly nullifying New York law.

Hard as it may try, Nationwide cannot justify review by stating that the Sixth Circuit's decision "ignor[ed] and

rewr[ote] basic reinsurance principles" and "contravenes basic rules of insurance and contract law . . . . " (Petition 13, 18.) As a federal court with diversity jurisdiction over this dispute, the Sixth Circuit was, of course, bound to follow New York law, not general or "basic" principles of some chimerical, free-floating insurance, reinsurance and contract law. Any suggestion that the Sixth Circuit should have followed "basic" rules of insurance or reinsurance law was laid to rest more than 60 years ago in Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

> Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state . . . There is no federal general common law.

Id., 304 U.S. at 64. If there were any doubt as to whether the Erie doctrine applied to contracts of insurance, it was forever laid to rest in Ruhlin v. New York Life Ins. Co., 304 U.S. 202, 205 (1938).

Nationwide's cases demonstrate that its "basic principles" of law are not basic principles of New York law. Colonial Am. Life Ins. Co. v. Commissioner, 491 U.S. 244 (1989) and Hartford Fire Ins. Co v. California, 509 U.S. 764 (1993), do not even purport to apply New York law and do not address the issue of the enforceability of a third-party disclaimer clause under any body of law, let alone purported "basic rules" of insurance or contract law. They merely make general statements regarding the differences between

"indemnity reinsurance" and "assumption reinsurance." Those distinctions have no bearing on this case.[8]

Likewise, with one exception, the remaining twelve cases cited by Nationwide do not apply New York law. Thus, these cases are also irrelevant. The one exception, Hope Mutual, soundly supports the Sixth Circuit's decision for the reasons explained on p. 14, supra.[9]

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[8] Furthermore, Nationwide admits that Hartford and Colonial have no application here. After noting that Colonial involved a split in the courts of appeals over federal tax code issues, and Hartford involved the issue of antitrust immunity under the McCarran-Ferguson Act, Nationwide concedes that "neither the federal tax code nor the McCarran-Ferguson Act is implicated here." (Petition at 11.)

Nationwide also seeks to justify review by suggesting that the Sixth Circuit's decision conflicts with Colonial and Hartford. First, as discussed in the text, supra, there is no conflict because those cases do not rely on New York law, and, in any event, do not address the enforceability of a third-party disclaimer clause. Second, although certiorari based on a conflict with a decision of this court may be proper where a court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this court," there are no federal questions at issue here. Sup. Ct. R. 10(c) (emphasis added).

[9] While Nationwide's cases may be dismissed without further discussion, it is still interesting to note that, of the many non-New York cases relied upon by Nationwide, only one – Shoaf v. Palatine Ins. Co., 37 S.E. 451, 452 (N.C. 1900) – addresses disclaimer clauses of any kind. The disclaimer clause there, however, did not contain

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Finally, in correspondence between the parties, counsel for Nationwide asserted that this Court will grant certiorari in order to assure uniformity among the federal courts on basic contract principles.[10] It is not, of course, the

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anything even remotely resembling the "[n]othing in this Agreement [to the contrary], express or implied" language which is controlling here. Beyond that, this turn of the century North Carolina case was obviously decided long before North Carolina adopted § 302 of the Restatement (Second) of Contracts, which provides that circumstances which otherwise would indicate an intent to give a third party the benefit of promised performance "can be negated by express agreement of the promisor and the promisee" See Fourth Ocean, 485 N.E.2d at 212 n.2 (adopting Restatement (Second) of Contracts, § 302). Now that North Carolina has adopted § 302, Shoaf is no longer good law even in North Carolina. See Snyder v. Freeman, 266 S.E.2d 593, 604 (N.C. 1980) (expressly adopting identical 1973 predecessor version of § 302 of the Restatement); Raritan River Steel Co. v. Cherry, Bekaert & Holland, 407 S.E.2d 178, 180 (N.C. 1991) (applying § 302 of the Restatement in denying plaintiff's third-party beneficiary claim). Finally, even if Shoaf were still good law, Shoaf addressed only a situation in which there was "a substitution of parties by mutual consent," i.e., a novation. U.S., to Use of Colonial Brick Corp. v. Federal Sur. Co., 5 F. Supp. 247, 250 (D. Md. 1933), aff'd, 72 F.2d 964 (4th Cir. 1934) (distinguishing Shoaf on this ground). Here, as in Federal Surety, it is undisputed that there has been no novation. (A 130)

[10] The only case cited by Nationwide's counsel, New York Life Ins. Co. v. Viglas, 297 U.S. 672 (1936), was decided approximately three years before Erie and Ruhlin. In any

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function of this Court to make sure that state courts or federal courts sitting in diversity apply state law on reinsurance uniformly. See Erie, 304 U.S. at 75; Ruhlin, 304 U.S. at 206-207. This court would subvert the purpose of the Erie doctrine if it accepted Nationwide's invitation to attempt to render uniform the laws of the fifty states. See Erie, 304 U.S. at 75 ("In attempting to promote uniformity of law throughout the United States, the doctrine [of Swift v. Tyson] had prevented uniformity in the administration of law of the state.") (emphasis added).

B. Nationwide's Attempt To Justify Review By Asserting That The Sixth Circuit Defeated The Expectations Of The Parties Is Unavailing

Unable to legitimately argue that the Sixth Circuit's decision "nullified" New York law, Nationwide asserts that the Sixth Circuit's decision "perverts the lawful expectation of parties to assumption reinsurance contracts . . . " by enabling "the primary insurer and reinsurer . . . [to] defeat

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event, it provides no support for the proposition that the court will grant certiorari in order to insure uniformity in state law. Viglas was a diversity case in which the defendant claimed that the jurisdictional amount required by the federal statute had not been met. The Court granted certiorari to resolve a conflict with one of its earlier decisions on a federal question, i.e., the computation of damages for the purposes of the jurisdictional amount required by statute. See Viglas, 297 U.S. at 675-76. Once again, there are no federal statutes or questions involved in this case. (See Petition at 4.)

the primary undertaking of assumption reinsurance by including a third-party disclaimer clause in their agreement." (Petition at 22-23.) Once again Nationwide misses the point. Even assuming the Assumption Agreement is an assumption reinsurance agreement, New York law permits the parties to that agreement to exclude non-parties from enforcing that agreement. If Nationwide believes that is unjust, it should petition the New York State legislature or the New York State Insurance Department, not this Court.

In any event, Nationwide's argument makes no sense. Nationwide is not a party to the Assumption Agreement and thus – like any other non-party – cannot have any "lawful expectations" under the Assumption Agreement. As the Sixth Circuit recognized (App. 9), the disclaimer clause dispositively reveals the lawful expectation of the parties' agreement, i.e., that neither Nationwide nor any other third party would have any right to enforce that agreement.

By the same token, Nationwide's suggestion that he disclaimer clause has "defeat[ed]" its "rights" begs the question. (Petition at 20.) Nationwide has no rights under the Assumption Agreement because the parties decided that neither Nationwide nor any other non-party would have any rights under the agreement. As the Sixth Circuit aptly pointed out, "[t]here is nothing wrong with this." (App. 10) It left Nationwide "with exactly the same recourse they would have had if Home and the other members of AFIA had never entered into the Assumption Agreement." (App. 10) Nationwide has the right to pursue its claims against Home and "[i]f coverage is due, Home will be forced to meet its obligations to Nationwide and then seek indemnification from the [CIGNA Respondents]" or Home may implead the CIGNA Respondents. (App. 10)

Nationwide, however, cynically contends that this "will never happen." (Petition at 21.) According to Nationwide, the CIGNA Respondents will "take over the defense of Home" and "argue that Home stands as an impenetrable barrier between the insured and the [CIGNA Respondents], thereby insulating the [CIGNA Respondents] from any direct liability should Home become insolvent." (Petition at 21.)

This assertion is groundless for at least two reasons. First, Home is not insolvent, and as the Sixth Circuit pointed out, no harm befalls Nationwide for having to seek recourse from Home. Second, on appeal Nationwide contended that issues regarding the parties' rights and liabilities in the event of Home's insolvency were not ripe for review. The Sixth Circuit agreed with Nationwide and did not rule on those issues. (App. 13) Nationwide cannot now raise the specter of Home's insolvency (an event which may never occur) to justify review of the Sixth Circuit's decision in this Court.[11]

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[11] Peppered throughout the Petition are thinly veiled (and unsupported) suggestions by Nationwide that a transfer of assets from Home to the CIGNA Respondents has somehow prejudiced Nationwide. (See, e.g., Petition at 20.) Nationwide, of course, has not and cannot demonstrate it has somehow been prejudiced by any transfer of assets.

POINT II

NATIONWIDE'S ATTEMPT TO JUSTIFY REVIEW BECAUSE OF PURPORTED "FEDERAL CONCERNS" IS UNAVAILING

Grasping at straws, Nationwide asserts that there are "federal concerns" present here and conclusorily argues that the Sixth Circuit's decision will somehow invite "confusion in the application of federal laws – tax, bankruptcy and antitrust, for example – to the international insurance industry." (Petition at 11, 17.) Leaving aside that Supreme Court Rule 10 nowhere refers to the "federal concerns" Nationwide cites, the Petition does not articulate just how the Sixth Circuit's decision could possibly lead to confusion in the application of bankruptcy, tax, antitrust, or any other federal laws. In any event, the mere fact that a transaction may tangentially relate to a body of federal law – for example, federal tax laws – does not mean that the courts should create what, in effect, would be federal general common law to govern the transaction itself. Reinsurance is a good example. Reinsurance transactions are subject to federal tax laws. State law, however, governs the interpretation and construction of reinsurance agreements. Erie, 304 U.S. at 78; Ruhlin, 304 U.S. at 205. Finally, the alleged "confusion" that Nationwide claims will arise in the application of federal laws because of the Sixth Circuit's decision cannot form the basis of a grant of a certiorari, because no federal laws are implicated here and there is thus simply no justiciable issue for review.

As part and parcel of its "federal concerns" argument, Nationwide claims (without citing any authority in support) that the "nature of the reinsuring agreement – indemnity or assumption – is critical to the willingness of participants to engage in a particular transaction," and that the "failure of a

United States Court of Appeals to acknowledge and enforce assumption reinsurance threatens the free flow of international insurance commerce." (Petition at 17.) This argument is pure sophistry.

First, the possibility that a court of appeal's ruling on a state law decision in a diversity case may affect international commerce is not a ground for certiorari, where as here, no constitutional provisions, treaties or federal statutes are implicated. See Leavitt, 518 U.S. at 145; Sup. Ct. R. 10. Indeed, all sorts of transactions governed by state law may affect international commerce in one way or another.

Second, the nature of the reinsuring agreement between two parties may well be important to them. As a matter of logic, the nature of the agreement – assumption or indemnity – can never be "critical" to the willingness of a non-party like Nationwide to participate or engage in the transaction which is the subject of the agreement. As Nationwide's own case law makes clear, "assumption reinsurance" agreements generally concern one company's assumption of a portfolio of existing business from another company. At the time that business was written, the insureds and reinsureds would ordinarily have no idea whether their insurer or reinsurer might at some point enter into an "assumption reinsurance" agreement. Thus, "assumption reinsurance" agreements can hardly be said to encourage parties to enter into insurance or reinsurance transactions.

Third, the Sixth Circuit did not "fail to enforce" an assumption reinsurance agreement. Assuming that the Assumption Agreement is in fact an "assumption reinsurance" agreement, the Sixth Circuit enforced it according to its terms.

Finally, Nationwide also attempts to raise "federal concerns" because assumption reinsurance agreements allegedly "serve the international insurance industry" and provide "critical" "dual sources of recovery" to policyholders. (Petition at 12.) Even if true, this statement is irrelevant. Regardless of how important assumption reinsurance agreements may or may not be, the rights and obligations owed to a non-party under those agreements is determined by state law and thus raises no "federal concerns."

Nationwide is obviously not happy with the result reached by the Sixth Circuit. But all the Sixth Circuit did was enforce a contract under New York law according to its plain and unambiguous terms. If, as Nationwide contends, the type of contract into which Home and the CIGNA Respondents entered is somehow inimical to the insurance industry or may otherwise cause regulatory problems, those problems would be appropriately addressed (if at all) by the state legislature or insurance department. It is not, however, for this Court, the Sixth Circuit or the District Court to rewrite the parties' contract simply because Nationwide, a non-party to the contract, is unhappy that it is not entitled to any benefits under the contract.

* * *

In sum, Nationwide has failed to provide any legitimate reason why the Sixth Circuit's decision on purely state law issues provides a basis for granting certiorari. Accordingly, its Petition should be summarily denied.

CONCLUSION

For the foregoing reasons, Nationwide's petition for a writ of certiorari should be denied.

Dated: January 11, 1999
New York, New York

Respectfully submitted,

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